

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BETH ANN BALL,

Defendant-Appellant.

UNPUBLISHED
February 17, 2011

No. 295425
Saginaw Circuit Court
LC No. 08-030433-FH

Before: SERVITTO, P.J., and GLEICHER and SHAPIRO, JJ.

PER CURIAM.

Following a jury trial, defendant Beth Ann Ball was convicted of operating a motor vehicle while under the influence of liquor (OUIL) causing death, MCL 257.625(4)(a). She was sentenced to 60 to 180 months' imprisonment, with one day of jail credit. Defendant appeals as of right. We affirm.

While intoxicated, defendant drove an automobile into the side of a duplex where she lived with her boyfriend. The impact caused the automobile to break through the wall and stop partially inside the residence. The accident resulted in the death of defendant's boyfriend, Glenn Coleman, who was sleeping on a couch in the duplex. Defendant was originally charged with one count of OUIL causing death, and charged in the alternative with involuntary manslaughter.

On the fifth day of trial, the prosecution made an oral motion on the record to amend the felony information so as to charge each of the two offenses individually rather than in the alternative. Defense counsel objected to the amendment based on the late stage of the proceedings, but the trial court granted the motion. The jury found defendant guilty of OUIL causing death, and guilty of negligent homicide as a lesser included offense of the involuntary manslaughter charge. Both parties agreed that the trial court should enter a judgment of conviction as to only one count. Although the defense requested that judgment enter as to the negligent homicide conviction, the trial court entered judgment as to the OUIL causing death conviction.

Defendant argues she is entitled to a new trial because the trial court permitted the prosecution to amend the felony information on the fifth day of the six day trial. Defendant argues the lack of notice prejudiced her defense and denied her due process. We review a trial court's decision to grant a motion to amend the information for an abuse of discretion. *People v*

Unger, 278 Mich App 210, 221; 749 NW2d 272 (2008). An abuse of discretion occurs when the trial court's decision "falls outside the principled range of outcomes." *People v Blackston*, 481 Mich 451, 460; 751 NW2d 408 (2008). Defendant's due process claim is unpreserved and is therefore reviewed for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 752-753, 764; 597 NW2d 130 (1999).

"A trial court may permit amendment of the information at any time to correct a variance between the information and the proofs, unless doing so would unfairly surprise or prejudice the defendant." *Unger*, 278 Mich App at 221. In this case, defendant was originally charged with OUIL causing death or in the alternative involuntary manslaughter. Defendant was not prejudiced by the amendment in this case because the amendment did not charge any new crime. Facing the original felony information, defendant would have prepared to defend against both charges. She was not "deprived of an opportunity to defend against the crime." *People v Stricklin*, 162 Mich App 623, 633-634; 413 NW2d 457 (1987). Indeed, she had been defending against these two crimes throughout the trial. There is nothing in the record to suggest that the defendant's defense at trial would have been different in any way had she originally been charged with both crimes rather than being charged with them in the alternative.

For the same reason, we reject defendant's claim that her constitutional right to due process was violated by the amendment to the information. Due process requires that a defendant be given reasonable notice of the charges against him and have an opportunity to present a defense. *People v McGee*, 258 Mich App 683, 699; 672 NW2d 191 (2003). Because the "constitutional notice requirement is not an abstract legal technicality," a defendant must "prove prejudice to his defense" in order to establish a due process violation. *Id.* at 699-700. Again, defendant was fully aware of both charges before the information was amended because the same two crimes were charged before the amendment, albeit charged in the alternative. Further, defendant was able to respond to the charges after the amendment because again, the amendment did not add any additional or new charge; it merely changed the format of the original charges. Defendant does not identify any specific way she was prejudiced on appeal, and based on the record there is no indication that defendant was prejudiced by the amendment. Thus, defendant is not entitled to relief on her due process argument. While defendant has not explicitly argued that charging both OUIL causing death and involuntary manslaughter constitutes double jeopardy, we note that charging both has been found proper. *People v Kulpinski*, 243 Mich App 8, 14-16; 620 NW2d 537 (2000).

Defendant also argues that she is entitled to a new trial because the trial court permitted the prosecution's expert rebuttal toxicology witness to listen to the testimony of defendant's expert toxicology witness despite the fact that there was a sequestration order in place. This court reviews a trial court's decision regarding witness sequestration for an abuse of discretion. *People v Jehnsen*, 183 Mich App 305, 309; 454 NW2d 250 (1990). The trial court's decision to exempt the prosecution's expert from the sequestration order and then to testify was not so arbitrary as to be beyond the range of principled outcomes in light of the purpose of a sequestration order. "The purposes of sequestering a witness are to prevent him from coloring his testimony to conform with the testimony of another, and to aid in detecting testimony that is less than candid." *People v Meconi*, 277 Mich App 651, 654; 746 NW2d 881 (2008) (internal citations omitted). In this case, the trial court's decision to exempt the prosecution's expert witness from the sequestration order and then to permit him to testify did not give rise to an

unreasonable risk of testimony that is purposely conformed to the testimony of another witness or to the risk of untruthful testimony. Rather, the prosecution requested that he be allowed to listen to the testimony of the defense expert as the prosecution had not received a pre-trial report from the defense as to their expert's opinions and expected testimony. Further, MRE 703 permits an expert to render an opinion based on facts that were made known to the expert during the trial; therefore, an expert's presence during the testimony of other witnesses at a trial is contemplated by the Michigan Rules of Evidence.

Finally, defendant argues that the trial court usurped the power of the jury when it entered only one count in the judgment of conviction. Defendant argues because the trial court usurped the power of the jury she is entitled to a new trial. Defendant did not properly preserve this argument for appeal; therefore, we review defendant's claim of error for plain error affecting substantial rights. *Carines*, 460 Mich at 752-753. Defendant has not shown that there was plain error affecting substantial rights in this case, and thus, she is not entitled to relief. Even assuming the entry of conviction was error, defendant's remedy would not be a new trial. If the trial court committed error when it entered the judgment of conviction, the remedy is remand for correction of the judgment to add entry of the additional conviction. See *People v Long*, 246 Mich App 582, 588; 633 NW2d 843 (2001) (proper remedy for error regarding entry of convictions is to modify the judgment of conviction); *People v Adams*, 245 Mich App 226, 242; 627 NW2d 623 (2001) (proper remedy is to modify judgment of conviction). As defendant has not sought such relief, we need not determine whether entering only one conviction was error.

Affirmed.

/s/ Deborah A. Servitto
/s/ Elizabeth L. Gleicher
/s/ Douglas B. Shapiro